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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 908

EDWIN GREEN, JR., as Administrator of the Estate of EDWIN GREEN, Deceased,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY,

Respondent.

MARY GREEN,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals on rehearing *en banc* is reported at 409 F.2d 1166. Earlier opinions in this case are reported at 304 F.2d 70; 304 F.2d 85; 154 So.2d 169 (Fla. 1962); 325 F.2d 673; and 391 F.2d 97.

Statute Involved

Section 25.031, Fla. Stat. Ann. (1961 ed.) provides as follows:

> "The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

Rule 4.61 of the Florida Appellate Rules, which implements this statute, is quoted in the petition (pp. 6-8).

Questions Presented

On the first appeal of this case in 1963, the Court of Appeals ruled that under Florida law a manufacturer impliedly warrants that "its products are reasonably wholesome or fit." This definition of implied warranty had been agreed to by the parties at the first trial; it was recognized as the applicable definition by the Florida Supreme Court in its advisory opinion in this case; and it was the defi-

nition followed by the trial court and the parties at the second trial. The following questions are presented in light of the foregoing circumstances:

1. Whether the Court of Appeals *en banc*—following the law of this case as thus established—correctly concluded that no reason existed to depart from this definition of Florida law.

2. Whether the Court of Appeals *en banc* abused its discretion when it concluded that this case presented no question for a second certification to the Supreme Court of Florida.

3. Whether various alleged errors in the trial court's instructions and rulings on evidence, considered and rejected by the Court of Appeals *en banc,* warrant further review by this Court.

Statement

Summary Statement

This diversity case involves a claimed breach of implied warranty under Florida common law. At the first trial, the jury returned general verdicts for defendant-respondent* of no liability. On appeal, and following certification to the Supreme Court of Florida, the Court of Appeals ordered a partial retrial on liability and damages. On the retrial, a second jury again returned general verdicts for respondent. The petition seeks review of a decision by the

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* Petitioners were plaintiffs below and are herein referred to as "petitioners." Respondent was defendant below and is herein referred to as "respondent." References to "Pet. App." are to the Appendix to Petition filed by petitioners herein. References to "R." are to the certified transcript filed by petitioners.

Court of Appeals for the Fifth Circuit, sitting *en banc,* which affirmed the latest judgments for respondent. The Court below concluded that no reason existed to depart from the definition of the applicable implied warranty established by the Court of Appeals at an earlier stage of this proceeding, consistently followed by the parties in both trials of these actions, and confirmed by the Florida Supreme Court in an advisory opinion obtained in 1963 pursuant to the Florida certification Statute and Rule.

The protracted proceedings in this case are more fully described below.

(i) The First Trial and Appeal

Edwin M. Green instituted this diversity action in December 1957, in the United States District Court for the Southern District of Florida against respondent, The American Tobacco Company, alleging that he had incurred lung cancer as a result of smoking respondent's "Lucky Strike" cigarettes, and seeking recovery on various theories of liability including breach of implied warranty.* Green died after the complaint was filed, and the present petitioners in these consolidated actions are his administrator and widow.

The definition of the applicable implied warranty was agreed to by the parties at the first trial of this action in July 1960. The trial court charged the jury that under Florida law a manufacturer "impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold" (325 F.2d at 676; Pet. App. 48a). This instruction, as the Court of Appeals later noted, "was

* All of the other alleged theories of liability were long since finally resolved against petitioners and are not involved here.

taken verbatim from plaintiffs' requested written charge, . . . the plaintiffs [having] consented to the insertion of the adverb 'reasonably' to modify 'wholesome or fit'" (325 F.2d at 676; Pet. App. 49a).

The trial court also charged the jury that "such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge" (325 F.2d at 676; Pet. App. 48a-49a). The case was submitted to the jury for its general verdicts and, in addition, the trial court submitted four written interrogatories pursuant to Rule 49(b), F.R.C.P., which "were not intended to cover each and every issue of fact" but only *"certain factual matters* that have occurred in this trial" (325 F.2d at 677; Pet. App. 51a; emphasis the Court's). No interrogatory was submitted covering the "reasonable fitness" issue.

The jury returned general verdicts for respondent. In response to the written interrogatories it said that (i) Green had primary lung cancer; (ii) the cancer was "the cause or one of the causes of his death"; (iii) smoking respondent's cigarettes was "a proximate cause or one of the proximate causes" of the cancer; and (iv) respondent could not have known "by the reasonable application of human skill or foresight" that smokers of its cigarettes were in danger of contracting lung cancer (304 F.2d at 71-72; Pet. App. 2a-3a).

On appeal, the Court of Appeals (Rives and Bell; Cameron dissenting) affirmed the judgments for respondent. The Court rejected petitioners' contention they were entitled to a directed judgment as to liability on the basis of the answers to the first three interrogatories (304 F.2d 70,

72-73 (1962); Pet. App. 3a-5a). Upon plaintiffs' petition for rehearing, the Court certified to the Florida Supreme Court the question of whether respondent's knowledge or opportunity for knowledge of the alleged hazard was relevant (304 F.2d at 85; Pet. App. 33a).

(ii) The Florida Supreme Court's Advisory Opinion and Subsequent Disposition by the Court of Appeals

Upon certification, the Florida Supreme Court ruled in June 1963, that under Florida law a manufacturer's "actual knowledge or opportunity for knowledge" is "wholly irrelevant to his liability on the theory of implied warranty" (154 So.2d 169, 170-71 (1963); Pet. App. 36a, 38a). The Florida court recognized that the warranty "involved in the instant case" was the "ordinary merchantability warranty" that a "product supplied for human consumption shall be reasonably fit and wholesome for that general purpose" (*id.* at 171, 172; Pet. App. 38a, 40a). This was the same definition to which the parties themselves had agreed at the first trial (*supra,* p. 4).

Following the advisory opinion, the Court of Appeals vacated the judgments for respondent in December 1963, on the ground that the jury had been erroneously instructed as to the relevance of respondent's knowledge or opportunity for knowledge (325 F.2d 673; Pet. App. 44a).

Petitioners had renewed their claim that they were entitled to directed judgments on the issue of liability based on the answers to the first three interrogatories, and they urged that the case be remanded solely for a determination of damages. The Court of Appeals rejected this contention. The Court noted the references by the Florida court to "the implied warranty that a product supplied for human con-

sumption shall be reasonably fit and wholesome for that general purpose," and concluded that was "a correct definition of the scope of the implied warranty under the law of Florida" as well as "the definition by which the parties are bound as a part of the law of this case" (325 F.2d at 675-76; Pet. App. 47a-48a).

The Court of Appeals held that a partial new trial was necessary because "the jury has not made any sufficient finding on the question of reasonableness, that is, as to whether or not the cigarettes were *'reasonably* fit and wholesome' " (325 F.2d at 677; Pet. App. 50a; emphasis the Court's). It remanded the case for a new trial on this issue. It directed that on the second trial the parties would be bound by the first jury's answers to the first three interrogatories (325 F.2d at 679; Pet. App. 55a).

(iii) Prior Petitions for Certiorari

Respondent filed a petition for writ of certiorari, and petitioners cross petitioned asking for entry of judgments on the liability issue, but they did not seek any further certification to the Florida Supreme Court. This Court denied both petitions in May 1964 (377 U.S. 943).

(iv) The Second Trial

The second trial was marked by sharp disagreement among expert witnesses. Petitioners sought to convince the jury that respondent's cigarettes were not reasonably fit and wholesome on the basis of expert testimony that smoking any kind of cigarettes causes lung cancer in a sizeable part of the smoking population.* Experts called by

* As the Court of Appeals pointed out: "There has never been presented by the evidence any contention that Lucky Strike ciga-

respondent—specialists in the fields of pathology, thoracic surgery, chest diseases, cancer research, pharmacology and biochemistry as well as statistics—controverted this testimony in every respect.

At the outset and throughout the trial, the trial court repeatedly charged the jury with respect to the prior jury's finding as to the cause of Green's lung cancer and told the jury it was to determine the "reasonable fitness" of the product "under all the circumstances" (e.g., R. Vol. VII 149, 151-152, 467, 525, 540; Vol. VIII 561, 563, 584, 949, 963, 972).* The jury was instructed on the implied warranty issue precisely in conformity with the directive of the Court of Appeals (R. Vol. VIII 970-995). This second jury returned general verdicts for respondent in November 1964.

(v) The Second Appeal

On appeal, petitioners contended the trial court erred (a) in excluding certain kinds of evidence; (b) in giving a "supplemental charge" to the jury; (c) in denying petitioners' motion for a directed verdict; and (d) in permitting some of respondent's expert witnesses to testify that they did not know the cause of lung cancer.

The panel (Judges Coleman and Simpson, and Judge Phillips of the 10th Circuit sitting by designation) dismissed the first three contentions as "minor matters," but

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rettes were more dangerous or had a greater propensity to cause lung cancer than cigarettes bearing other brand names. Nor has there been any contention that the cigarettes which Mr. Green smoked contained any foreign substance or any spoiled, contaminated or other substandard ingredient which caused his injury and death. Instead, plaintiffs' contention from the beginning has been that cigarettes—not Lucky Strike cigarettes alone—cause lung cancer" (325 F.2d at 676; Pet. App. 48a).

* From the outset petitioners themselves had agreed this was the issue to be determined at the second trial (R. Vol. VII 149, 151-154).

Judges Coleman and Phillips agreed with the fourth contention and ruled that the judgment should be reversed (391 F.2d 97, 101-104; Pet. App. 66a, 74a-83a). Judge Simpson dissented, finding no reversible error had been committed in the admission of such testimony (391 F.2d at 106-107; Pet. App. 88a-90a).

The panel rejected petitioners' argument that the trial court should have directed verdicts, recognizing that it could not properly "overrule the prior decision [of the Court of Appeals] which constituted the law of the case" on the implied warranty issue (391 F.2d at 102-103; Pet. App. 77a). The Court stated that "the District Court had to retry the case under the directions he had received from this Court" and that a jury question had been presented "as of the date of that particular trial" (*ibid.*).

The majority went on to hold, however, that in their view the Florida law had changed subsequent to the second trial, and that the applicable warranty was no longer defined in terms of a product's "reasonable fitness." They directed judgments for petitioners on the issue of liability based on the jury's answers to interrogatories at the first trial and remanded the case for a trial limited to damages (391 F.2d at 106; Pet. App. 87a).

Judge Simpson—the only Florida judge on the panel—dissented, concluding after a detailed analysis that there had been no intervening change in Florida law, that the panel majority had disregarded settled principles of "law of the case," and that it had improperly overruled the controlling decision of the prior panel of the Court of Appeals (391 F.2d at 106; Pet. App. 87a).

Judge Simpson emphasized that the "reasonable fitness" definition had not only been followed by the parties at both trials but also had been confirmed as correct by both

the Court of Appeals and the Florida Supreme Court. He therefore concluded (391 F.2d at 113; Pet. App. 106a):

> "If there is such a thing as the 'law of the case' ever being permanently and impregnably established, the series of events listed above should establish for all time and for all purposes of this case that the scope and nature of the implied warranty here is one of 'reasonable wholesomeness and fitness for use by the public.'"
>
> "By a stroke of the majority's pen this consistent treatment of the question by the parties and by all the courts involved is obliterated from the record. It is as though what the record clearly shows did happen never happened at all. On the record before us, I cannot concur."

(vi) The *En Banc* Decision

A motion by respondent for rehearing *en banc* was granted, and after further briefs* by both sides the Court of Appeals *en banc,* by a vote of 8 to 3, receded from and overruled the decision of the panel majority, adopted the views previously expressed by Judge Simpson and affirmed the judgments for respondent (409 F.2d 1166; Pet. App. 110a).

The three dissenting judges stated that in their view petitioners were entitled to judgments on the liability issue under Florida implied warranty law and that the ques-

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* After the petition for rehearing *en banc* was filed, the Court clerk requested both parties to submit copies of all prior briefs in this case for use by the Court in considering the petition; these were supplied and, in addition, after rehearing was granted, both sides submitted new briefs to the Court *en banc* and petitioners submitted a reply brief as well.

tion whether the cigarettes were unmerchantable as a matter of law should have been certified to the Florida Supreme Court (409 F.2d 1166-1170; Pet. App. 111a-120a).

Petitioners' subsequent petition for further rehearing, in which they urged for the first time that there should be a second certification to the Florida Supreme Court, was denied by the Court *en banc* by a vote of 10 to 1 (Pet. App. 121a).

ARGUMENT

1. There Is No Conflict With Florida Law

Petitioners first seek review of the determination that "reasonably fit and wholesome" is the definition of implied warranty under Florida law applicable in this case. This local law question presents no issue warranting review by this Court.

The critical facts are as follows:

(i) At the first trial, petitioners and respondent both recognized and the District Court charged the jury that the applicable warranty was that respondent's product be "reasonably fit and wholesome" (*supra*, pp. 4-5).

(ii) In its advisory opinion, the Florida Supreme Court recognized that the warranty "involved in the instant case" was "the ordinary merchantability warranty" that a "product supplied for human consumption shall be reasonably fit and wholesome for that general purpose" (*supra*, p. 6).

(iii) The Court of Appeals, immediately following this advisory opinion, ruled this was "a correct definition of

the scope of the implied warranty under the law of Florida" as well as "the definition by which the parties are bound as a part of the law of this case" (*supra*, p. 7).

(iv) At the second trial, the District Court charged the jury in conformity with the directive of the Court of Appeals that this was the applicable warranty and the jury's general verdicts resolved the conflicting evidence on the reasonable fitness issue in respondent's favor (*supra*, pp. 7-8).

(v) The panel which heard the second appeal unanimously recognized that this definition constituted the law of the case. The only basis on which Judges Coleman and Phillips concluded they could disregard the prior ruling of the Court of Appeals on this point was that there had been a change since December 1963 in the Florida law of implied warranty. They relied for this conclusion on two Florida decisions: *McLeod* v. *W. S. Merrill Co., Division of Richardson-Merrill, Inc.*, 174 So.2d 736 (1965), and *Foley* v. *Weaver Drugs, Inc.*, 177 So.2d 221 (1965).

As demonstrated by Judge Simpson, neither *McLeod* nor *Foley* effected any change in the Florida law of implied warranty (391 F.2d at 108-111; Pet. App. 91a-103a). Petitioners themselves never contended the state law had changed (391 F.2d at 109-110; Pet. App. 95a-96a), and avoid a clear endorsement of that position here (Pet. 23-24).* Further, those judges who dissented from the

* Petitioners cite Florida cases both before and after the advisory opinion which discuss "absolute" or "strict" liability and argue that to recover they need only prove the product caused an injury (Pet. 22-23). But, as Judge Simpson noted (391 F.2d at 109; Pet. App. 95a), in context these terms are merely used in Florida "to distinguish between the negligence concept of fault as opposed to the implied warranty concept of liability regardless of fault," and reflect the rule that a manufacturer's lack of knowledge is no defense to a claim for breach of implied warranty.

en banc opinion below, including Judge Coleman, did not base their dissent on any purported change in Florida law.

Petitioners do not cite any Florida case on this subject which was not thoroughly considered below. Many Florida cases subsequent to the certification opinion in 1963 (a) reiterate that "reasonable fitness" is the applicable standard;* (b) emphasize that this issue presents "a factual question for the jury"** and (c) conclude that this standard "does not contemplate that a manufacturer should be made the insurer for *all* physical injuries caused by his products."† If petitioners' contrary theory were correct, the Florida Supreme Court could easily have said so in its advisory opinion. It did not do so, and later took occasion in *Community Blood Bank, Inc.* v. *Russell,* 196 So.2d 115 (Fla. 1967), to cite *"Green* with approval as authorizing remand *'for trial on issues of fact'"* (391 F.2d at 110; Pet. App. 98a; emphasis the Court's).

In these circumstances, the Court *en banc* was clearly correct in its interpretation of Florida law and in adhering to the law of this case as a matter of "orderly judicial action." E.g., *Insurance Group Committee* v. *Denver & Rio Grande Western Railroad Co.,* 329 U.S. 607, 612 (1947); *Lincoln National Life Insurance Co.* v. *Roosth,* 306 F.2d 110, 113 (5 Cir. 1962), *cert. denied,* 372 U.S. 912 (1963).

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* E.g., *Zabner* v. *Howard Johnson's, Inc.,* 201 So.2d 824, 827 (Fla. App. 1967); *Wisner* v. *Goodyear Tire & Rubber Co.,* 167 So.2d 254, 255 (Fla. App. 1964).

** E.g., *Gates & Sons, Inc.* v. *Brock,* 199 So.2d 291, 294 (Fla. App. 1967).

† E.g., *Royal* v. *Black & Decker Mfg. Co.,* 205 So.2d 307, 309 (Fla. App. 1967; emphasis the Court's).

This Court has repeatedly made clear that it "ordinarily accepts the determination of state law as found by the Court of Appeals; particularly where, as here, the same finding is made by the District Court . . ." and that certiorari will not be granted simply to review such a determination. *Appalachian Power Co.* v. *American Institute of Certified Public Accountants,* 80 Sup. Ct. 16, 18 (1959) (application for stay of mandate to Brennan, J.), *cert. denied,* 361 U.S. 887 (1959); *In re Woods,* 143 U.S. 202 (1892); *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 534 (1949); *General Box Co.* v. *United States,* 351 U.S. 159, 165 (1956); *Commissioner of Internal Revenue* v. *Estate of Bosch,* 387 U.S. 456, 462 (1967). No reason exists here to depart from this well-settled rule.

2. The Case Presents No Question for Further Certification to the Florida Supreme Court

Petitioners contend the Court of Appeals "should have certified the entire case at bar" to the Florida Supreme Court. We submit that petitioners misconceive the nature of the certification procedure and have not demonstrated that the Court of Appeals abused its discretion in declining further certification.

First, absent "exceptional circumstances" it is "the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment." E.g., *Meredith* v. *Winter Haven,* 320 U.S. 228, 234-35 (1943). Certification is a procedure reserved for resolution of exceptional and important issues. Thus, this Court has held the certification procedure should be invoked if important constitutional questions would otherwise be presented, or if issues relating to the jurisdiction of this Court require clarification.

Contrast with the present case *Clay* v. *Sun Insurance Office Limited*, 363 U.S. 207 (1960); *Dresner* v. *City of Tallahassee*, 375 U.S. 136 (1963); and *Aldrich* v. *Aldrich*, 375 U.S. 249 (1963).

The Court of Appeals has shown no reluctance to utilize the Florida certification procedure in appropriate cases but it has declined to do so where the issue "is neither intricate enough nor repetitive enough to warrant a *Clay* type referral to the Supreme Court of Florida." *Motor Vehicle Cas. Co.* v. *Atlantic National Ins. Co.*, 374 F.2d 601,.602 n. 1 (5 Cir. 1967); see also, *Hamilton* v. *Maryland Cas. Co.*, 368 F.2d 768 (5 Cir. 1966); *Greer* v. *Associated Indem. Corp.*, 371 F.2d 29 (5 Cir. 1967). Here petitioners themselves told the Court *en banc* that the instant case was important only to the immediate parties and "will obviously have severely limited value as a precedent." *Brief for Appellants Following Granting of Rehearing En Banc*, p. 35.*

Petitioners' reliance upon *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968) is misplaced (Pet. 30). In that case, this Court ruled that the Court of Appeals for the 10th Circuit should abstain from deciding a point of New Mexico law pending decision on the same issue involving the same parties by the New Mexico state courts. This Court emphasized that the state law issue involved

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* Significantly, too, petitioners did not tell the Court of Appeals in 1963 that the questions which they now seek to have certified should have been certified to the Florida Supreme Court and their subsequent cross petition for writ of certiorari took no such position (*supra*, p. 7). In these circumstances, we submit that petitioners' belated demand for recertification is untimely. See, e.g., *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 30-32 (1961), in which this Court held a party had "abandoned its claim of error . . . by failing to raise that question in its previous petition for certiorari here" (367 U.S. at 32).

in *Kaiser*—eminent domain with respect to water rights—was "of vital concern" to New Mexico and was "truly novel" (391 U.S. at 594). The New Mexico Attorney General interceded and urged abstention (388 F.2d at 266 n. 17), and this Court stressed the need for applying the same rule of law with an even hand "to all other businesses and landowners concerned" (391 U.S. at 594).

The present case is not remotely parallel in these respects to *Kaiser*. No "truly novel" legal issue of "vital concern" can be said to exist merely because of conflicting opinions among expert witnesses. Juries, not courts, must resolve such conflicts and the jury resolved this case on its own particular facts.* E.g., *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

Second, the Florida certification Statute and Rule do not contemplate, as petitioners urge, that "the entire case" can be certified. Nor do they contemplate that the Florida Court can decide which party should prevail on the merits.** Petitioners' plea for further certification amounts to no more than a plea to transfer jurisdiction of this

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* The dissenting opinions of Judges Brown and Coleman below thus erred in assuming a certifiable question of law could be framed based on selected statistical testimony of petitioners' experts which failed to withstand cross-examination, was contradicted by respondent's experts and presented a question of fact resolved by the jury in respondent's favor.

** Only "questions or propositions of the laws of this state" may be certified (*supra,* p. 2). See also Rule 4.6 of the Florida Appellate Rules permitting certification of "questions or propositions of law" by intermediate state courts to the Florida Supreme Court, and the latter's consistent refusal to answer questions of fact or decide the whole case. E.g., *Jaworski* v. *City of Opa-Locka,* 149 So.2d 33 (Fla. 1963); *Dade County* v. *Philbrick,* 162 So.2d 266 (Fla. 1964); *Schwob Co.* v. *Florida Industrial Commission,* 11 So.2d 782 (Fla. 1942). See also this Court's practice under Rules 28 and 29 on certification of legal questions from courts of appeals or the Court of Claims. E.g., *Cross* v. *Evans,* 167 U.S. 60 (1897); *Warner* v. *New Orleans,* 167 U.S. 467 (1897); *Del Monte Min. Co.* v. *Last Chance Min. Co.,* 171 U.S. 55 (1898); *Pfleuger* v. *Sherman,* 293 U.S. 55 (1934).

case, by the certification route, from the federal court to the state court. However, petitioners invoked the jurisdiction of the federal courts; they were content in 1963 to retry this case without asking the Court of Appeals to solicit further advice from the state court; and having lost, they should not at this late date be permitted to frustrate the jurisdiction of the federal courts over diversity cases and to undo all that has gone before in this lengthy proceeding.*

3. The Trial Court's Instructions and Evidentiary Rulings at the Second Trial Present No Question for Review by This Court

No issue warranting review by this Court is presented by petitioners' claims that the Seventh Amendment was violated by reason of certain evidentiary rulings by the trial court and its "supplemental charge." All of these claims, save one, were dismissed as "minor matters" even by the two judges of the panel who voted to reverse the judgments for respondent (391 F.2d at 102; Pet. App. 75a).

The only other alleged error cited by petitioners was the admission of certain testimony by respondent's experts that they did not know the cause of lung cancer (*supra*, p. 8). The Court *en banc* carefully considered this alleged error and concluded, per Judge Simpson, that (a) this line of testimony "was opened up by and in direct response to testimony by the plaintiffs' experts"; (b)

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* In no event could the federal court, let alone the Florida Supreme Court, properly enter judgments for petitioners on the liability issue (Pet. 26) on the basis of the first jury's answers to interrogatories pursuant to Rule 49(b) F.R.C.P. That Rule permits such a judgment only when "the answers are consistent with each other but one or more is inconsistent with the general verdict." No such inconsistency occurred here.

"*plaintiffs'* expert witnesses testified either on direct or cross-examination to similar lack of knowledge as to the cause of cancer"; and (c) there was no basis on which to conclude "that the admission of this testimony confused the jury 'as to that which had already been determined to be a fact'" (391 F.2d at 106-107; Pet. App. 88a-90a; emphasis the Court's).

In sum, the decision of the Court of Appeals *en banc* is clearly correct. Two juries have returned verdicts for respondent in the instant case. The Court of Appeals has three times rejected the contentions as to implied warranty advanced by petitioners. The questions now tendered do not raise serious recurring issues of substance which merit review by this Court.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: February 2, 1970

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing Brief of Respondent in Opposition to the Petition for a Writ of Certiorari was served by mail this 2nd day of February, 1970 upon Lawrence V. Hastings and Irma Robbins Feder, 312 Biscayne Building, Miami, Florida 33130, counsel of record for petitioners herein, by depositing the same in a United States mail box at 25 Broadway, New York, N. Y. 10004 in a wrapper addressed to each of said counsel as aforesaid with sufficient airmail postage prepaid.

JANET C. BROWN
Counsel for Respondent

Dated: February 2, 1970